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15 UNITED STATES DISTRICT COURT
16 EASTERN DISTRICT OF CALIFORNIA: FRESNO DIVISION
17

18 Pamela Kincaid, Doug Deatherage, Charlene
Clay, Cynthia Greene, Joanna Garcia, Randy
19 Johnson, Sandra Thomas, Alphonso Williams,
and Jeannine Nelson, Individually on Behalf of
20 Themselves and All Others Similarly Situated,

Plaintiff,

v.

22 City of Fresno, Alan Autry, Jerry Dyer, Greg
23 Garner, Reynaud Wallace, John Rogers, Phillip
Weathers, Will Kempton, James Province, Daryl
24 Glenn, Individually and in Their Official
Capacities; DOES 1-100, inclusive,

Defendant.

Civil Action No.: 06-CV-1445-OWW

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR CLASS
CERTIFICATION**

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TABLE OF AUTHORITIES

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Cases

Aiken v. Obledo,
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15 *In re Textainer P'ship Sec. Litig.*,
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1 United States Code, Section 1983 17

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Other Authorities

3 Newberg on Class Actions (4th ed. 2002)..... 9, 19

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1 **I. INTRODUCTION**

2 Plaintiffs seek an order under Fed. Rule Civ. P. 23(b)(2) and 23(b)(3) certifying and
3 authorizing them to represent a class consisting of all persons in the City of Fresno who
4 were, are, or will be homeless at any time after October 17, 2003, and whose personal
5 belongings have been or may in the future be taken or destroyed by one or more of the
6 defendants.¹ The proposed class and the action meet all of the requisites for class
7 certification under Rule 23 of the Federal Rules of Civil Procedure.

8 The City of Fresno and the remaining Defendants have been seizing and summarily
9 destroying the valuable and essential personal property of homeless people in Fresno,
10 according to their ongoing unlawful practice and policy. The unlawful conduct follows a
11 common pattern and results in the same legal violations against all class members. The
12 proposed class representatives are nine presently or formerly homeless persons living in the
13 City of Fresno (“Fresno”) each of whom has lost personal property because of Defendants’
14 practice and policy. Plaintiffs have been victims of this ongoing practice and policy and
15 have suffered substantial injury and damages because of it. Their experience is typical of
16 the class of homeless persons they seek to represent.

17 Plaintiffs primarily seek a permanent injunction and a declaration of the illegality of
18 this ongoing conduct. Secondly, Plaintiffs seek damages for the losses suffered, much of
19 which is common as well. The overarching issue of Defendants’ liability will involve
20 common proof, much of which has already been presented and considered by the Court in
21 the proceedings for preliminary injunctive relief. The common issues include:

22 (a) whether Defendants’ policies and practices in conducting the sweeps at issue are
23 unlawful in that they result in immediate destruction of property;

24 (b) whether Defendants’ policies and practices in conducting the sweeps at issue are
25 unlawful in that they fail to provide adequate pre- or post-seizure notice and fail to provide
26 any opportunity to recover seized property;

27 _____
28 ¹ For simplicity, Plaintiffs and the putative plaintiff Class will be referred to herein as
“Plaintiffs.”

1 (c) the nature of injunctive relief that should be ordered, including notice
2 requirements, the amount of time allowed to move property, and what must be done with
3 property that is removed; and

4 (d) whether Defendants are liable for statutory and/or punitive damages and if so,
5 how much.

6 Proof as to each of these issues will be the same for each individual plaintiff.

7 The policies and practices of Defendants that led to this action are plainly alleged
8 and, to a substantial degree, have already been proven: the policy of the Defendants is to
9 treat the property of homeless people as waste, subject to immediate destruction, and to treat
10 the homeless themselves as persons without any value or rights. The history of this case to
11 date strongly demonstrates a need for a fair and prompt determination of the rights of
12 homeless persons in Fresno, which can only be done through a class action. Given the
13 inherently unequal positions of the parties and the especially limited resources of class
14 members, it is highly unlikely class members would be able to proceed individually. By the
15 very nature of their circumstances, homeless people are ill-equipped to bring their clearly
16 valid claims to this Court. That the sweeps at issue occurred twice per month from the start
17 of 2004 through October 2006 without legal challenge in itself shows that persons affected
18 by these sweeps are not in a position to protect their own rights by filing individual suits.
19 For these reasons, class certification is essential to the fair and efficient resolution of their
20 rights.

21 **II. STATEMENT OF FACTS**

22 Fresno and the other Defendants in this case have been engaged in the ongoing,
23 conscious practice—based upon official policy—of seizing and summarily destroying the
24 personal possessions of essentially all homeless persons living in Fresno who reside on the
25 street or sidewalk or any other similar area. (Statement and Decision of Findings Re: Pls.’
26 Application for Prelim. Inj. ¶¶ 32-34.) The conduct of both the City and Caltrans has been
27 consistent and uniform as to all homeless persons whom they encounter. Defendants sweep
28

1 through an area where homeless people are found and intentionally take and destroy
2 essentially all of the possessions of the homeless.

3 The challenged conduct has been repeated over and over and is virtually uniform in
4 nature: Early in the morning, the seizure of property begins, usually with a bulldozer.
5 Garbage trucks or other heavy equipment also are used. Rhodes Decl. ¶¶ 4 and 9; Kincaid
6 Decl. ¶ 4; Deatherage Decl. ¶ 3; Clay Decl. ¶ 3; Greene Decl. ¶ 4; Garcia Decl. ¶ 6; Streeter
7 Decl. ¶ 2; Williams Decl. ¶ 2; Vizcarrondo Decl. ¶ 2; Apper Decl. ¶¶ 4 and 6. The
8 Community Sanitation Division typically operates the equipment, with Police Department
9 representatives and other employees of Defendants on hand to assist in the process.

10 Once the raid is underway, the bulldozer makes a pass, scooping up most of the
11 Plaintiffs' possessions and dumping them into a garbage truck where they are quickly
12 crushed. Rhodes Decl., ¶ 6; Deatherage Decl., ¶ 6; Kincaid Decl., ¶ 9; Clay Decl., ¶ 3;
13 Greene Decl., ¶ 6; Garcia Decl., ¶ 7; Johnson Decl., ¶ 2; Streeter Decl., ¶ 3; Apper Decl., ¶
14 8. As the proof already presented amply demonstrates, Defendants seize and immediately
15 destroy all of homeless people's personal property:²



24 The destruction is final and complete:³

25
26 _____
27 ² I am informed and believe that this photograph is a fair and accurate depiction of a raid on
28 the homeless was taken by Dallas Blanchard on February 4, 2004, and published in the SF Bay
Area Independent Media Center web page.

³ Rhodes Decl. ¶ 9.

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Whatever possessions of the homeless that the bulldozer misses are thrown into the garbage truck so that when the raid is complete, nothing is left.

Homeless people are not permitted to retrieve their possessions or save them from destruction. If they seek to retrieve their property, they are threatened with arrest. Streeter Decl. ¶ 3; Apper Decl. ¶ 9. No one is permitted to interfere with the seizure and destruction of the possessions of the homeless:⁴



The evidence already before the Court establishes the following, all of which are part of a common practice and policy of Defendants directed toward homeless people:

1. Defendants routinely raid areas where homeless residents live in Fresno, California. All of the raids are conducted under color of law and as part of a common policy and practice of the City of Fresno, implemented by Fresno employees and the

⁴ Rhodes Decl., ¶ 12.

1 remaining Defendants.

2 2. In each of these raids, Defendants confiscate and destroy all of the personal
3 property of the homeless that they find, making no distinction between obviously important
4 and valuable personal property, and anything that could be legitimately regarded as
5 abandoned or “trash.”

6 3. As a result, homeless people lose most, if not all, of the few possessions they
7 own, including: essential items such as their shelter (often a tent), clothing, and medication;
8 important documents such as identification cards, birth certificates, and medical records;
9 and personal items such as radios, small televisions, bicycles, and tools. At the same time,
10 property of enormous and irreplaceable personal value such as photographs of loved ones
11 and personal keepsakes and treasured family mementos are also destroyed, causing
12 enormous depredation and anguish.

13 4. Defendants give little or no actual notice of their impending raids and, in
14 virtually every case, what little notice may be given is inadequate to allow homeless persons
15 to retrieve and preserve their personal belongings.

16 5. Defendants make no effort to retain or preserve any of the property that they
17 confiscate, even though it is obvious that much of this property is valuable to the Plaintiffs
18 and in many cases represents virtually everything they own. Instead, Defendants
19 immediately destroy all of the property that they confiscate, often while the homeless watch
20 helplessly.

21 6. Any homeless person who protests or seeks to retrieve their personal
22 possessions to prevent them from being destroyed are restrained by Fresno police officers.
23 Once the raid begins, efforts to stop it or to “interfere” by retrieving personal property are
24 met with threats of arrest.

25 7. The homeless are not cited for violation of any ordinance or law of the City of
26 Fresno or the State of California in connection with the destruction of their property.
27 Rather, the policy and practice of Defendants is to “clean up” the area by destroying
28 everything that the homeless people own. It is this practice and policy that is unlawful and

1 that this lawsuit challenges.

2 The issue whether these policies are unlawful is common to all Defendants.
3 Plaintiffs have established that Defendants' conduct was undertaken in the execution of
4 customs, policies and practices authorized by policymakers of the defendant City of Fresno
5 (discussed in detail, *supra*). Plaintiffs have also sufficiently alleged that Caltrans and its
6 agents had knowledge of the City's policies and acted jointly or conspired with other
7 Defendants to authorize, acquiesce or set in motion the uniform policies and plans at issue
8 in this case. (*See* SAC ¶ 38; *see also* Mem. Denying Mot. to Dismiss at 5:23-7:11.)
9 Documents located thus far indicate that Caltrans employees have participated substantially
10 in the unlawful conduct. These policies have lead to numerous raids, a number of which
11 occurred on property belonging to Caltrans, including the raids conducted on May 3, May
12 25, June 22 and August 26 of 2006 that resulted in the taking and destruction of the property
13 of multiple named Plaintiffs. (Deatherage Decl. ¶¶ 3, 6; Green Decl. ¶ 5.) Because
14 Plaintiffs' claims against both the City of Fresno and Caltrans are based on the same course
15 of conduct arising from a joint and common practice, each of the named Defendants'
16 liability is based on the same legal arguments, and Plaintiffs are entitled to the same relief
17 with respect to each individual Defendant.

18 **III. ARGUMENT**

19 Plaintiffs ask this court to certify a class consisting of:

20 all persons in the City of Fresno who were, are, or will be homeless at any time after
21 October 17, 2003, whose personal belongings have been or may in the future be taken or
22 destroyed by one or more of the defendants.

23 As the courts have made clear, whether Plaintiffs have met the Rule 23 requirements
24 for class certification does not involve an inquiry into the merits of the case. *See Dukes v.*
25 *Walmart, Inc.*, 474 F.3d 1214, 1227 (9th Cir. 2007) ("A motion for class certification is not
26 the occasion for a mini-hearing on the merits.") (citation omitted); *Eisen v. Carlisle &*
27 *Jacquelin*, 417 U.S. 156, 177 (1974) ("There is nothing in either the language or history of
28 Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a
suit in order to determine whether it may be maintained as a class action . . ."). The Court

1 need only determine that Plaintiffs have offered sufficient evidence to form a “reasonable
2 judgment” that each of the requirements of Rule 23 have been satisfied. *Blackie v. Barrack*,
3 524 F.2d 891, 901 (9th Cir. 1975); *see also Eisen*, 417 U.S. at 178. In doing so, the Court
4 should take the substantive allegations of the complaint as true. *Blackie*, 524 F.2d at 901
5 n.17. In this case, the Court also has the additional benefit of evidence presented and the
6 findings made in the hearing on Plaintiffs’ Motion for Preliminary Injunction, which
7 strongly support the appropriateness of class certification.

8 The proposed class meets all the requirements of Rule 23(a): numerosity,
9 commonality, typicality and adequacy of representation. In addition, this class meets the
10 requirements of Rule 23(b)(2) in that final injunctive relief is appropriate, and Rule 23(b)(3)
11 in that common questions of law or fact predominate and a class action is a superior method
12 of adjudication.

13 **A. All Requirements Of Federal Rule 23(a) Are Met.**

14 Federal Rule of Civil Procedure 23(a) sets forth four prerequisites for maintenance
15 of a class action:

- 16 (1) The class must be so numerous that joinder of all members is impracticable;
- 17 (2) There must be questions of law or fact common to the class;
- 18 (3) The claims or defenses of the representative parties must be typical of the
19 claims or defense of the class; and
- 20 (4) The representative parties must fairly and adequately protect the interests of
21 the class.

22 *See also Eisen*, 417 U.S. at 163. Some courts have also imposed two additional, implied
23 requirements: (1) that a “defined identifiable class exists” and (2) “that the class
24 representatives must also be members of the class.” *Harrington v. City of Albuquerque*, 222
25 F.R.D. 505, 509 (D.N.M. 2004).

26 **1. The Proposed Class Satisfies the Two Implied, Threshold**
27 **Requirements of Federal Rule 23(a).**

28 The proposed class is defined and identifiable. The description of the class is definite

1 enough that it is “administratively feasible to determine if a given individual is a member of
2 the class.” *Aiken v. Obledo*, 442 F. Supp. 628, 658 (E.D. Cal. 1977). In this case, class
3 members may be identified by a simple showing that they are homeless in the City of
4 Fresno (or were during the applicable class period) and have personal property that they
5 keep with them while homeless. *See Joyce v. City and County of San Francisco*, 1994 U.S.
6 Dist. LEXIS 20264, at *19 (N.D. Cal. 1994) (finding that class members who have been
7 cited for violations to challenged program would be easily ascertainable, and it would not
8 be difficult to determine which persons cited were also without shelter and either financially
9 impoverished or mentally incapacitated); *Pottinger v. City of Miami*, 720 F. Supp. 955, 958
10 (S.D. Fla. 1989) (finding class of homeless individuals who have been or expect to be
11 arrested for certain conduct readily ascertainable).

12 All class representatives are also members of the class. All named plaintiffs are
13 individuals who were homeless and lived in the City of Fresno at some time during the
14 relevant period, and each suffered substantial injuries as a result of the Defendants’ policy
15 of unlawful seizure and destruction of their personal belongings on multiple occasions. All
16 of the class representatives have submitted declarations to this effect; six of whom
17 additionally testified at the hearing on the Preliminary Injunction. (See SAC ¶¶ 49-57;
18 Kincaid Decl., Deatherage Decl., Clay Decl., Greene Decl., Garcia Decl., Johnson Decl.,
19 Thomas Decl., Williams Decl., Nelson Decl.) (each identifying themselves as homeless
20 residents of the City of Fresno and describing the nature and extent of their injuries as a
21 result of Defendants’ conduct).

22 2. The Proposed Class is Sufficiently Numerous.

23 The class proposed is so numerous that “joinder of all members is impracticable.”
24 Fed. R. Civ. P. 23(a)(1). “[I]mpracticability does not mean impossibility, but only the
25 difficulty or inconvenience of joining all members of the class.” *Harris v. Palm Springs*
26 *Alpine Estates Inc.*, 329 F.2d 909, 913-14 (9th Cir. 1964). The numerosity requirement
27 calls for “examination of the specific facts of each case and imposes no absolute
28 limitations.” *Gen. Tel. Co. of the Northwest, Inc. v. EEOC*, 446 U.S. 318, 330 (1980).

1 Generally, classes of more than forty plaintiffs are sufficiently numerous. *See Consol. Rail*
2 *Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995); *E.E.O.C. v. Kovacevich*
3 *“5” Farms*, 2007 WL 1174444, at *21 (E.D. Cal. April 19, 2007); *see also Jordan v.*
4 *County of Los Angeles*, 669 F.2d 1311, 1319 n.10 (9th Cir. 1982) *judgment vacated on*
5 *other grounds* at 459 U.S. 810 (1982) (indicating numerosity requirement satisfied for class
6 consisting of thirty-nine members).

7 The testimony already adduced in this case demonstrates that this requirement has
8 been easily met. Over 8,000 residents of Fresno are homeless, more than 98% whom are
9 unsheltered. (*See* SAC 8:2-14, citing Fresno Madera Continuum of Care Plan To End
10 Homelessness (CCP) at 10-11.) Defendants’ policy has been implemented in at least 25
11 sweeps per year since the beginning of 2004 (Testimony of Reynaud Wallace, Nov. 22,
12 2006; *see also* RT vol. II, 83-83, 117- 18, Nov. 16, 2006 (Williams and Kincaid)) and has
13 resulted in at least 50 separate sweeps (Statement of Decision and Findings Re: Pls.’
14 Application For Prelim. Inj. 13:24-27). Based upon the First Amended Complaint,
15 declarations and testimony now before the Court, it is beyond any reasonable doubt that at a
16 minimum, hundreds of homeless people in Fresno meet the class definition. Given the
17 frequency of sweeps conducted by the city and the number of homeless individuals who
18 have already been or will be affected, the potential number of plaintiffs satisfies the
19 numerosity requirement of 23(a)(2).

20 Other factors in this matter, including the inability of individual homeless persons to
21 institute separate suits and the nature of the underlying relief Plaintiffs seek, also show that
22 joinder is not practical. *See Nat’l Ass’n of Radiation Survivors v. Walters*, 111 F.R.D. 595,
23 599 (N.D. Cal. 1986).⁵ Given their condition and lack of resources, class members are
24 uniquely unable to obtain an adjudication of their rights by filing separate suits. Not only
25

26 ⁵ *See also* Newberg § 3.6 (4th ed. 2002) (“Factors relevant to the joinder
27 impracticability issue include judicial economy arising from avoidance of a multiplicity of
28 actions, geographic dispersment of class members, size of individual claims, financial
resources of class members, the ability of claimants to institute individual suits, and
requests for prospective injunctive relief which would involve future class members.”).

1 are they unfamiliar with the legal system, but the frustration and fear of law enforcement as
2 a result of the challenged policies makes these class members especially unable to pursue
3 legal remedies individually. These factors make it all the more essential that the proposed
4 class should be certified. *See Gutierrez v. Kovacevich “5” Farms*, 2004 WL 3745224, at
5 *4 (E.D. Cal. December 2, 2004).⁶

6 **3. There are Many Common Issues of Law and Fact.**

7 Rule 23(a)(2) requires that “there be questions of law or fact common to the class.”
8 It does not require that all questions of law or fact be common to every single member of
9 the class. Rather, Plaintiffs need only point to a single issue common to the class.
10 *Walmart*, 474 F.3d at 1225; *Slaven v. BP Am., Inc.*, 190 F.R.D. 649 (C.D. Cal. 2000); *see*
11 *also Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998); *Baby Neal v. Casey*,
12 43 F.3d 48, 56 (3d Cir. 1994) (holding commonality requirement met “if the named
13 plaintiffs share *at least one question* of fact *or* law with the grievances of the prospective
14 class”) (emphasis added). Courts have not considered commonality a difficult hurdle; the
15 requirement should be “construed permissively.” *Hanlon*, 150 F.3d at 1019; *see Walmart*,
16 474 F.3d at 1225.

17 Commonality is generally satisfied where, as in this case, “the lawsuit challenges a
18 system-wide practice or policy that affects all of the putative class members.” *Armstrong v.*
19 *Davis*, 275 F.3d 849, 868 (9th Cir. 2001); *LaDuke v. Nelson*, 762 F.2d 1318, 1332 (9th Cir.

20 _____
21 ⁶ Difficulty in identifying and locating affected persons also makes joinder
22 impracticable in this matter. *See Harris*, 329 F.2d at 913-914. In this case, class members
23 are dispersed throughout the City of Fresno. Most are without a fixed residence and are
24 often moving between shelters and the streets, which makes it difficult to identify and locate
25 individuals. *See Bullock v. Bd. of Educ.*, 210 F.R.D. 556, 559 (D. Md. 2002) (finding that
26 the transience of homeless individuals “would undoubtedly make it impracticable to
27 identify and join them all”). The courts have also held joinder is impracticable in cases
28 such as the present, where the primary relief sought is injunctive and class members who
will be impacted in the future cannot be ascertained at the present. *See Skinner v. Uphoff*,
209 F.R.D. 484, 488 (D. Wyo. 2002) (finding certification appropriate for class of current
and future prisoners seeking injunctive relief; “[a]s members *in futuro*, they are necessarily
unidentifiable, and therefore joinder is clearly impracticable”). For these additional reasons,
the numerosity requirement is clearly satisfied.

1 1985). Differences in the ways in which these practices affect individual members of the
2 class do not undermine the finding of commonality. *Armstrong*, 275 F.3d at 868 (finding
3 commonality requirement satisfied despite individual class members having different
4 disabilities, since all suffered similar harm as a result of defendant's actions); *Milonas v.*
5 *Williams*, 691 F.2d 931, 938 (10th Cir. 1982) (holding that common issue of law concerning
6 legality of defendant's practices overrode factual differences among class members);
7 *Gutierrez*, 2004 WL 3745224 at *5.

8 This action arises from challenges to policies and practices that adversely affect
9 homeless persons throughout the City of Fresno. Plaintiffs will show – as they did at the
10 preliminary injunction hearing – that the City and the remaining Defendants have adopted a
11 policy and engaged in the common practice of conducting raids that result in the seizure and
12 immediately destruction of the personal property of homeless individuals without adequate
13 notice or an opportunity to retrieve the property after it is taken. (SAC ¶¶ 38-47; Statement
14 of Decision and Findings Re: Plaintiffs' Application for Prelim. Inj. ¶¶ 32-40.) This policy
15 treats all homeless persons and their property the same, and each raid is conducted in a
16 nearly identical fashion. The commonality element is plainly satisfied in this case.

17 As a result, the case presents numerous common issues of law and fact. These are
18 discussed in more detail at pages 6-, *infra*, but include:

19 (a) the nature of Defendants' policies, practices and conduct in conducting these
20 sweeps, including whether Defendants provided adequate notice and whether they were
21 sufficiently justified;

22 (b) whether Defendants' policies, practices and conduct violate Class members' state
23 and federal constitutional rights against unreasonable search and seizures;

24 (c) whether Defendants' policies, practices and conduct violate Class members' due
25 process rights under the California and United States Constitutions;

26 (d) whether Defendants' conduct violates Class members' rights under California
27 Civil Code Sections 52 and 52.1, California Civil Code Section 2080, California
28 Government Code Section 815.6 and the common law tort of conversion;

1 (e) Whether injunctive relief restraining further unconstitutional and unlawful acts by
2 Defendants should be ordered by the court, and, if so, the nature of that injunctive relief.

3 Each of these issues may be resolved by a showing of common proof for all class
4 members. This case easily meets the low standard for commonality under Rule 23(a).

5 **4. The Claims of the Named Plaintiffs are Typical of the Class They**
6 **Seek to Represent.**

7 Typicality under Rule 23(a)(3) is satisfied when “each class member’s claim arises
8 from the same course of events, and each class member makes similar legal arguments to
9 prove the defendant’s liability.” *Armstrong*, 275 F.3d at 868. Under the rule’s “permissive
10 standards,” representative claims are typical if they are “reasonably co-extensive with those
11 of absent class members; they need not be substantially identical.” *Hanlon*, 150 F.3d at
12 1020. Where the plaintiffs are members of a class and “members of the class have
13 repeatedly suffered personal injuries in the past that can fairly be traced to the [defendants’]
14 standard . . . practices” then the proper analysis considers the defendant’s treatment of the
15 class as a whole. *Armstrong*, 275 F.3d at 864, quoting *LaDuke*, 762 F.2d at 1326. In such
16 cases, minor factual variations between individual plaintiff’s circumstances are irrelevant
17 since all arise from the same conduct and proceed under the same legal theory.

18 The First Amended Complaint, testimony and declarations in the record, now before
19 the Court, amply establish that each of the class representatives is a member of the class.
20 Each has been subject to the same policies and practices that have affected the class
21 members they seek to represent. The named Plaintiffs each present claims based on
22 Defendants’ policy of taking and destroying the personal property of homeless individuals
23 in the City of Fresno without adequate notice or an opportunity to retrieve the property once
24 it has been taken. Each of the named Plaintiffs and every member of the proposed class has
25 suffered the deprivation of his or her personal property as a result of this policy.

26 Due to the nature of the putative class, the types of property lost in these raids are
27 typically very similar, including items necessary to survival such as tents, blankets,
28 clothing, and medicines; as well as irreplaceable personal possessions, such as family

1 photographs, personal records and documents. (SAC ¶1, Nature of the Case.) The class
2 representatives have also suffered the same types of physical and emotional harms that
3 other class members have suffered, including hospitalization for illnesses caused by
4 exposure to the elements after losing shelter and bedding. *See* RT Vol. II, 372, 428, Nov.
5 16, 2006 (Thomas and Nelson).

6 Plaintiffs' claims are also typical with respect to individual defendants.⁷ Plaintiffs
7 challenge a uniform policy implemented by the concerted efforts of the City of Fresno and
8 the other named Defendants, including Caltrans employees. Plaintiffs as a group have
9 suffered the same injury – the seizure and destruction of their property – as a result of the
10 concerted actions of Defendants in implementing the same unlawful policies. For these
11 reasons, Rule 23(a)(3) typicality is satisfied.

12 **5. The Named Plaintiffs and Their Counsel are Adequate** 13 **Representatives.**

14 Rule 23(a)(4) requires that the named representatives "will fairly and adequately
15 protect the interests of the class." The rule is satisfied where the named plaintiffs and their
16 counsel (1) do not have any conflicts of interest with other class members and (2) will
17 "prosecute the action vigorously on behalf of the clients." *In Re Mego Fin. Corp. Sec.*
18 *Litig.*, 213 F.3d 454, 462 (9th Cir. 2000); *see also Walmart*, 474 F.3d at 1233. Here, the
19 named Plaintiffs seek to stop Defendants from seizing and destroying the personal property
20 of their fellow homeless residents of Fresno, and also to obtain compensation for past
21 violations. There is absolutely no reason to believe that any homeless persons in Fresno

22
23 ⁷ *See Easter v. Am. West Fin.*, 381 F.3d 948, 962 (9th Cir. 2004); *LaMar v. H&B*
24 *Novelty & Loan Co.*, 489 F.2d 461, 465-66 (9th Cir. 1973) (holding that the Rule 23(a)
25 requirements are satisfied where the plaintiffs as a group, both named and unnamed, have
26 suffered the same injury at the hands of several parties related by way of a conspiracy or
27 concerted scheme, or where defendants are "juridically related in a manner that suggests a
28 single resolution of the dispute would be expeditious"); *In re Textainer P'ship Sec. Litig.*,
2005 U.S. Dist. LEXIS 40974, at *32 (N.D. Cal. 2005) (holding that class certification
appropriate where plaintiff's claims were based on "a method of dealing more or less
common to all defendants," and a "concerted scheme between the defendants at whose
hands the class suffered injury").

1 would be opposed to either of these goals.

2 Named Plaintiffs represent a diverse and typical cross-section of homeless men and
3 women in Fresno. Moreover, the representative Plaintiffs have demonstrated by their
4 attendance at hearings and continued participation in this lawsuit that they will maintain a
5 continuing interest in pursuing the action aggressively and eliminating the oppressive
6 policies to ensure justice is served. *See, e.g. Walmart*, 474 F.3d at 1235 (“It is reasonable
7 that plaintiffs who feel that their rights have been violated by [defendant’s] behavior would
8 want that behavior, and the injustice it perpetuates, to end.”). Plaintiffs have a continuing
9 interest to pursue the action to the fullest to ensure that they and other class members will
10 no longer be subjected to the unlawful conduct that destroys their property, violates their
11 rights, and degrades them.

12 Plaintiffs’ counsel are experienced in class action matters, complex litigation, and the
13 law in this area. Plaintiffs’ counsel have represented Plaintiffs from the inception of this
14 case, have appeared before the Court in several proceedings, and their ability to serve as
15 counsel is apparent.

16 **B. The Proposed Class Satisfies The Requirements Of 23(b)(2).**

17 Certification under Rule 23(b)(2) is appropriate when the defendant “has acted or
18 refused to act on grounds generally applicable to the class, thereby making appropriate final
19 injunctive relief or corresponding declaratory relief with respect to the class as a whole.”
20 Fed. R. Civ. P. 23(b)(2). “Civil rights cases against parties charged with unlawful, class-
21 based discrimination are prime examples” of Rule 23(b)(2) classes. *Amchem Prods., Inc. v.*
22 *Windsor*, 521 U.S. 591, 614 (1997). Indeed, Rule “23(b)(2) was adopted in order to permit
23 the prosecution of civil rights actions.” *Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir.
24 1998).

25 **1. Defendants Have Engaged in a Common Practice With Respect to**
26 **the Class as a Whole Making Injunctive Relief Appropriate.**

27 Certification under 23(b)(2) is appropriate here because Defendants have acted and
28 refused to act on grounds generally applicable to the entire class. *See Walters*, 145 F.3d at

1 1047. Defendant's policies regarding their treatment of the property of homeless persons
2 are generally applicable to the entire class defined above. *See* section III A.2, 3 *supra*.
3 Permanent injunctive and corresponding declaratory relief is appropriate with respect to the
4 class as a whole.

5 **2. Money Damages are Secondary and Do Not Bar Certification**
6 **under 23(b)(2).**

7 Rule 23(b)(2) class actions can include claims for monetary damages so long as such
8 damages are not the predominant relief sought, but instead are "secondary to the primary
9 claim for injunctive or declaratory relief." *Molski v. Gleich*, 318 F.3d 937, 947 (9th Cir.
10 2003). To determine whether money damages predominate, the court should "examine the
11 specific facts and circumstances of each case, *focusing predominantly on the plaintiff's*
12 *intent in bringing the suit.*" *Walmart*, 474 F.3d at 1234 (emphasis added); *see also Ellis v.*
13 *Costco Wholesale Corp.*, 240 F.R.D. 627, 642 (N.D. Cal. 2007) ("The Ninth Circuit
14 require[s] a case-by-case determination of predominance, focusing on the motives of the
15 named plaintiffs and the nature of the defendant's actions."). The amount of damages at
16 issue is not particularly relevant: even a case that may result in billions of dollars in
17 damages may be suitable for certification under Rule 23(b)(2). *Walmart*, 474 F.3d at 1236.

18 Plaintiffs' motive in bringing this case may be inferred from such evidence as the
19 Plaintiffs' own statements and the purpose and effect of the injunctive relief sought,
20 including the effect of injunctive relief on other class members and whether the equitable
21 relief sought would be necessary should the Plaintiffs succeed on their claims. *Ellis*, 240
22 F.R.D. at 642-643; *Wang v. Chinese Daily News, Inc.*, 231 F.R.D. 602, 611 (C.D. Cal.
23 2005) (citing both defendant's continuous violations of California laws and plaintiffs'
24 allegations that injunctive relief "necessary" to avoid "irreparable damage" as sufficient
25 evidence primary relief sought injunctive).

26 Plaintiffs have primarily sought declaratory and injunctive relief with respect to the
27 class as a whole. (SAC ¶¶ 1-3, Prayer for Relief.) The declarations of the named Plaintiffs
28 support this contention, and make it clear that the primary goal of the litigation is relief

1 from the constant fear and vulnerability suffered as a result of the City's ongoing policies;
2 money damages are never even mentioned. For these reasons, the proposed class meets the
3 requirements for certification under Rule 23(b)(2).

4 **C. Plaintiffs Also Satisfy The Requirements Of Rule 23(b)(3).**

5 In addition, Plaintiffs' claims support certification under Rule 23(b)(3) because
6 "questions of law or fact common to the class predominate over any questions affecting
7 individual members, and the class action is superior to other available methods for the fair
8 and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3).

9 **1. The Common Questions of Law and Fact Predominate.**

10 The Rule 23(b)(3) predominance inquiry tests "whether proposed classes are
11 sufficiently cohesive to warrant adjudication by representation." *Amchem Prods.*, 521 U.S.
12 at 623. When common issues present a "significant aspect" of the case and may be resolved
13 on a class-wide basis in a single adjudication, "there is clear justification for handling the
14 dispute on a representative rather than on an individual basis." *Local Joint Exec. Bd. of*
15 *Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1162 (9th Cir.
16 2001). The "fundamental question is whether the group aspiring to class status is seeking to
17 remedy a common legal grievance." *Lockwood Motors, Inc. v. General Motors Corp.*, 162
18 F.R.D. 569, 580 (D. Minn. 1995).

19 There are numerous common issues that predominate in this case. The dominant
20 common issues in this case relate to the nature of Defendant's policies and practices and the
21 nature and extent of their liability. Specifically, Plaintiffs will establish by common
22 evidence:

23 (a) The nature of Defendants' policies and practices toward the homeless, including:
24 the nature of their "sweeps" or "raids" upon the homeless, the immediate seizure and
25 destruction of the property of the homeless, the absence of meaningful notice or opportunity
26 to get out of the way of Defendants' destructive raids, the failure to store any of the seized
27 property, and the cost and feasibility of that storage;

28 (b) That Defendants' policies, which result in the irrevocable destruction of

1 Plaintiffs' property, are without probable cause and violate Plaintiffs' constitutional rights
2 against unreasonable search and seizure under the Fourth Amendment to the United States
3 Constitution and Article 1, § 13 of the California Constitution;

4 (c) That Defendants' policies fail to give adequate notice or an opportunity to
5 retrieve property once it has been taken and violate Plaintiffs constitutional rights to Due
6 Process of Law under the Fourteenth Amendment of the United States Constitution and
7 Article 1, § 7(A) of the California Constitution;

8 (d) That Defendants' policies are intended to single out homeless people, have the
9 purpose and effect of depriving homeless people of their property and driving homeless
10 people from the city of Fresno and are based on Defendants' animus towards this disfavored
11 group and lack a rational relationship to any legitimate government interest and therefore
12 violate Plaintiffs constitutional rights to Equal Protection of the Laws under the Fourteenth
13 Amendment of the United States Constitution and United States Code, Section 1983 and
14 under Article 1, Section 7(A) of the California Constitution;

15 (e) That Defendants' policies violate California Civil Code Section 2080 *et seq.* in
16 that, among other things, Defendants have failed to safeguard the personal property of
17 Plaintiffs and members of the plaintiff class found on public land, failed to inform the
18 owners of the personal property within a reasonable time of finding this property, failed to
19 document the property found, and failed to make restitution of the property to its owners or
20 to make arrangements to permit them to retrieve it;

21 (f) That Defendants' policies violate California Civil Code Section 52.1 because
22 they constitute interference, and attempted interference, by threats, intimidation, and
23 coercion, with Plaintiffs' exercise and enjoyment of rights secured by the Constitutions and
24 laws of the United States and California, in violation of California Civil Code § 52.1, and
25 that as a result of such violations, Defendants are liable to Class Members for statutory
26 damages;⁸

27 _____
28 ⁸ Because proof of individual damages is not required for statutory damages under § 52.1, this is another common issue that should be determined on a class-wide basis. *See*

1 (g) Whether and to what extent certain Defendants are liable to the Class for punitive
2 damages, and the amount of punitive damages to which the plaintiff Class is entitled; and

3 (h) That Defendants' policies constitute an unlawful conversion of Plaintiffs'
4 property by denying Plaintiffs the possession of their property when Plaintiffs were at all
5 relevant times the owners of personal property confiscated and destroyed by defendants and
6 remain entitled to the possession of their personal property.

7 In contrast to these numerous common issues of fact and of law, individualized
8 issues in this case are limited: whether each plaintiff did, in fact, have property destroyed by
9 the defendants and, if so, the appropriate compensatory damages. These types of
10 individualized issues – which are present in nearly all class actions – do not defeat class
11 certification under Rule 23(b)(3). *See Mendoza v. Zirkle Fruit Co.*, 222 F.R.D. 439, 447-48
12 (E.D. Wash. 2004). And, since the majority of items taken (e.g., tents, bedding, clothes)
13 were common to most, if not all, Class members, common evidence may be offered to
14 establish the value of such items, and a simple calculation may be used to determine
15 individual damages. *See Local Joint Exec. Bd.*, 244 F.3d at 1163. While individualized
16 proof might be necessary in some exceptional cases, “[c]ourts routinely find Rule 23(b)(3)’s
17 predominance requirement satisfied despite the need for individualized damage
18 determinations when the fact of injury is common.” *Lockwood Motors*, 162 F.R.D. at 582;
19 *see also Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975) (“The amount of damages is
20 invariably an individual question and does not defeat class action treatment.”) (citation
21 omitted); *Local Joint Exec. Bd.*, 244 F.3d at 1163 (holding that some “variation among
22
23

24 *Botosan v. Paul McNally Realty*, 216 F.3d 827, 835 (9th Cir. 2000). *See also Arnold v.*
25 *United Artists Theatre Circuit, Inc.*, 158 F.R.D. 439 (N.D. Cal. 1994); *Moeller v. Taco Bell*
26 *Corp.*, 2004 WL 615085 (N.D. Cal. February 23, 2004) (certifying class based on statutory
27 damages under Cal. Civ. Code § 52). District Courts have also certified classes under
28 § 52.1. *See e.g. Gibson v. County of Riverside*, 181 F. Supp. 2d 1057, 1062-64 (C.D. Cal.
2002). Although Plaintiffs are aware of one case where class was not certified under § 52.1,
see Taggart v. Solano County, 2005 U.S. Dist. LEXIS 31799 (E.D. Cal. 2005), the many
common issues in this case clearly predominate and the proposed class should be certified.

1 individual [plaintiffs], as well as some potential difficulty of proof” was no bar to
2 certification under 23(b)(3) “given the number and importance of common issues”).

3 **2. Class Treatment is Superior to Other Available Methods.**

4 The present case is a classic example of a claim that is appropriate for class
5 certification since the claims of the individuals are relatively small and an individual
6 claimant is not likely to have the resources, motivation, or practical ability to pursue the
7 action on his or her own. *See Gutierrez*, 2004 WL 3745224, at *9. Given their general lack
8 of education and resources, class members are unlikely to institute separate suits (and none
9 have done so since the City started its unlawful sweeps over three years ago). Not only are
10 they unfamiliar with the legal system, but their frustration with the City and State and fear
11 of law enforcement, which results from the policies, patterns and practices at issue in this
12 case, makes these class members especially unlikely to pursue legal remedies. Thus, their
13 interest – or lack thereof – in individually controlling separate actions and the fact that no
14 class members have brought individual suits over the past three years weigh in favor of
15 class treatment. *See Fed. R. Civ. P. 23(b)(3)(A) and (B)*.

16 In addition, the primary relief sought is injunctive in nature so the burden and
17 expense make it impractical for individual class members to sue separately. Individual
18 lawsuits would result in duplicative discovery and require multiple courts to analyze the
19 same evidence. Given the potentially large class and the relatively minimal compensatory
20 damages, the costs of separately proving damages would likely outweigh the potential
21 recovery and make individual actions unfeasible. The costs to join all of the potential parties
22 would also be prohibitively high. A class action, in contrast, provides for administrative
23 efficiency by streamlining the process and avoiding multiplicity of actions. *See Newberg on*
24 *Class Actions*, § 5:46 (4th ed. 2002) (*citing Gen. Tel. Co. of the Southwest v. Falcon*, 457
25 U.S. 147, 155 (1982) (“[T]he class action device saves the resources of both the courts and
26 the parties by permitting an issue potentially affecting every class member to be litigated in
27 an economic fashion under Rule 23.”).

28 Moreover, the long history of the unlawful conduct that went unchallenged in the

1 courts until present counsel came on the scene demonstrates that the private counsel would
2 be highly unlikely to represent the homeless individually on a contingency basis. A class,
3 on the other hand, will allow individual Plaintiffs to “pool claims which would be
4 uneconomical to litigate individually.” *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809
5 (1985) (stating that in cases where each individual plaintiff’s actual damages are small most
6 “would have no realistic day on court if a class action were not available”).

7 **IV. CONCLUSION**

8 Plaintiffs have established all of the requirements for certification of this case as a
9 class action. For all these reasons, Plaintiffs request that this action be certified as a class
10 action, that Plaintiffs be certified as the representatives of the class, and that Plaintiffs’
11 counsel be certified as the counsel for the class.

12 June 15, 2007

13
14 Respectfully submitted,

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16 HELLER EHRMAN LLP

17 LAWYERS’ COMMITTEE FOR CIVIL RIGHTS

18
19 ACLU FOUNDATION OF NORTHERN
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20
21 By /s/ Paul Alexander

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